

学校编码: 10384

分类号_____密级_____

学号: X2009120046

UDC _____

廈門大學

硕 士 学 位 论 文

劳务派遣法律制度研究

Research on the Legal System of Labor Dispatch

黄彩凌

指导教师姓名: 潘 峰 助理教授

专 业 名 称: 法 律 硕 士

论文提交日期: 2012 年 11 月

论文答辩时间: 2012 年 月

学位授予日期: 2012 年 月

答辩委员会主席: _____

评 阅 人: _____

2012 年 11 月

厦门大学博硕士论文摘要库

厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下,独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果,均在文中以适当方式明确标明,并符合法律规范和《厦门大学研究生学术活动规范(试行)》。

另外,该学位论文为()课题(组)的研究成果,获得()课题(组)经费或实验室的资助,在()实验室完成。(请在以上括号内填写课题或课题组负责人或实验室名称,未有此项声明内容的,可以不作特别声明。)

声明人(签名):

年 月 日

厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

（ ） 1. 经厦门大学保密委员会审查核定的保密学位论文，
于 年 月 日解密，解密后适用上述授权。

（ ） 2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人：

年 月 日

厦门大学博士论文摘要库

内容摘要

本文以《劳动合同法》修订为契机，冀求通过正确认识劳务派遣的发展过程，合理评估劳务派遣的积极作用、存在弊病和发展趋势，立足我国现行的立法实际，借鉴有关国家立法经验，对劳务派遣法律制度进行再思考，对规范劳务派遣提出具体建议。

本文除前言和结语外共分为四部分：

第一章为劳务派遣概述。主要是通过分析劳务派遣的概念、特征等，进一步明确本文的研究对象。同时，深入分析了劳务派遣单位、被派遣劳动者和用工单位之间的双边法律关系，为下文法律制度的研究做了基础铺垫。此外，本章还对劳务派遣与其他劳动形态的区别作了介绍，为正确认识劳务派遣这一用工方式提供了参考。

第二章为发达国家劳务派遣法律制度比较。本章主要从三个国家的劳务派遣的发展及法律制度的重点内容，来分析其优势。其中，美国是劳务派遣的起源地，对其劳务派遣法律制度进行分析必不可少；德国是欧洲高福利国家的代表，其在职工权益维护上不遗余力，因此该国在劳务派遣法律制度方面的完善程度极具代表性；日本是亚洲国家中模仿欧美国家法制建设方面最成功的国家之一，其做法具有较强的借鉴意义。本章还对以上三个国家在立法方面的优点进行了总结，归纳了三个方面的借鉴意义。

第三章为我国劳务派遣法律规制现状及存在问题。本章从我国劳务派遣发展的历程入手，介绍了当前我国劳务派遣的现状，分析了我国现行劳务派遣立法原则和法律制度的主要内容，并就当前存在的问题和原因进行了深入探讨，旨在找出一条符合我国国情的劳务派遣法制之路。

第四章为我国劳务派遣法律制度的完善。基于上文的分析、启示和借鉴，本章提出了依靠法制体系建设，进一步规范劳务派遣用工行为，使其走上正常发展轨道的建议。具体来说分为四个方面：一是建立严格的劳务派遣市场准入和退出机制；二是规范劳务派遣的适用范围；三是保障被派遣劳动者的平等就业权；四是进一步完善雇主责任。

关键词：劳务派遣；法律规制；劳动合同法

厦门大学博士论文摘要库

Abstract

Taking the opportunity of amendment of “Labor Contract Law”, this article aims to assess the positive role, existing disadvantage and development trends of labor dispatch reasonably through correctly understanding the development process of labor dispatch. Based on the current legislation practice of China as well as learning from legislation experience of relevant countries, this article also aims to take a reconsideration of legal system of labor dispatch and then put forward specific proposals on regulating labor dispatch.

In addition to the preface and epilogue, this article is divided into four parts.

Chapter one is on outline of labor dispatch. This chapter focuses on analyzing the concept and characteristics of labor dispatch to further clarify the study object of this article. At the same time, this chapter analyzes the bilateral of labor dispatch unit, laborer for services and employing unit to pave the way for studying the legal systems as below. Besides, this chapter also introduces the differences of labor dispatch and other labor forms to provide a reference for a correct understanding of labor dispatch.

Chapter two is on comparison of legal systems of labor dispatch in developed countries. This chapter analyzes advantages of legal systems of labor dispatch in three countries from the perspective of development of labor dispatch and important content of legal systems in these countries. The United States is origin of labor dispatch, so it is absolutely necessary to analyze its legal systems of labor dispatch. Germany stands for countries with high social welfare benefits in Europe and tries its best to protecting the rights and interests of workers, so it is highly representative of having refined legal systems of labor dispatch. Japan is one of the most successful Asian countries in following the example of legal system construction of European and American countries, so its practice has a great significance for reference. This chapter also summarizes the advantages of legislation of the three countries above and sums up the reference significance in four aspects.

Chapter three is on the current situation and existing problems of legal regulation of labor dispatch in China. This chapter starts from the development course of labor dispatch in China, introduces the current situation, analyzes the legislative principles

and main contents of legal systems and discusses the current problems and their causes hoping to find a way for legal system construction of labor dispatch in line with China's national conditions.

Keys Words: Labor Dispatch; Legal Regulation; Labor Contract Law

厦门大学博硕士论文摘要库

目 录

前 言	1
第一章 劳务派遣概述	4
第一节 劳务派遣的界定	4
一、劳务派遣的概念	4
二、劳务派遣的特征	4
第二节 劳务派遣法律关系分析	6
一、劳务派遣单位与被派遣劳动者之间是法定化的劳动合同关系	6
二、用工单位与被派遣劳动者之间是事实劳动关系	6
三、劳务派遣单位与用工单位之间是劳务派遣协议关系	7
第三节 劳务派遣与其他劳动形态的区别	7
一、劳务派遣与职业介绍的区别	7
二、劳务派遣与业务外包的区别	8
三、劳务派遣与业务借调的区别	8
第二章 发达国家劳务派遣法律制度比较	10
第一节 美国劳务派遣法律制度	10
一、美国劳务派遣的发展状况	10
二、美国劳务派遣的法律规制	10
三、总体评价	13
第二节 德国劳务派遣法律制度	14
一、德国劳务派遣的发展状况	14
二、德国劳务派遣的法律规制	15
三、总体评价	17
第三节 日本的劳务派遣法律制度	17
一、日本劳务派遣的发展状况	17
二、日本劳务派遣的法律规制	18
三、总体评价	20
第四节 国外劳务派遣法律制度对我国的启示	20

一、注重考虑本国劳动力市场的具体情况·····	20
二、注重以法律规范保障劳动者的基本权益·····	21
三、注重对劳务派遣过度使用的限制·····	22
第三章 我国劳务派遣法律规制现状及存在的问题·····	23
第一节 我国劳务派遣发展现状·····	23
一、我国劳务派遣的发展历程·····	23
二、我国劳务派遣的发展规模·····	24
第二节 我国劳务派遣现行制度分析·····	25
一、我国劳务派遣立法的原则·····	25
二、我国劳务派遣法律制度的主要内容·····	26
第三节 我国劳务派遣法律制度实施中存在的问题及原因·····	28
一、我国劳务派遣法律制度实施中存在的问题·····	28
二、原因分析·····	32
第四章 我国劳务派遣法律制度的完善·····	34
第一节 建立严格的劳务派遣市场准入机制和退出机制·····	34
一、市场准入机制·····	34
二、市场退出机制·····	36
第二节 规范劳务派遣的适用范围·····	36
一、限定适用劳务派遣的行业范围和岗位范围·····	36
二、进一步明确劳务派遣的“三性”问题·····	37
三、严格控制劳务派遣工在职工总数中的比例·····	38
第三节 保障被派遣劳动者的平等就业权·····	38
一、自由择业权的保护·····	38
二、职业平等权的保护·····	39
第四节 确立劳务派遣中两“雇主”对“雇员”的共同赔偿责任·····	41
一、明确用工单位和被派遣劳动者的法律关系是确定雇主赔偿责任的 前提条件·····	41
二、用工单位与劳务派遣单位对派遣者应承担连带责任·····	41
三、劳务派遣单位与用工单位内部责任的承担方式·····	42

结 语	43
参考文献	44
致谢语	47

厦门大学博硕士论文摘要库

厦门大学博硕士论文摘要库

CONTENTS

Preface	1
Chapter 1 The Summary of Labor Dispatch	2
Subchapter 1 The conception of Labor Dispatch	4
Section 1 Definition of Labor Dispatch	4
Section 2 Features of Labor Dispatch	4
Subchapter 2 Legal analysis of Labor Dispatch	6
Section 1 The Relationship Between a Worker Dispatch Service Provider and a Worker to be Dispatched is a Legal Contract Relationship	6
Section 2 The Relationship Between a Dispatcher Worker and an Entity that Accepts the Worker is Factual Employment Relationship	6
Section 3 The Relationship Between a Worker Dispatch Service Provider and an Entity that Accepts the Worker is a Dispatch Agreements Relationship	7
Subchapter3 Labor Dispatch is different from Other Forms of Labor	7
Section 1 Labor Dispatch is Different from Occupation Introduction	7
Section 2 Labor Dispatch is Different from Business Outsourcing	8
Section 3 Labor Dispatch is Different from Business Loan	8
Chapter 2 Comparison of Legal Systems of Labor Dispatch in Developed Countries	10
Subchapter 1 The United States Legal System of Labor Dispatch	10
Section 1 Development Status	10
Section 2 The Legal Regulation	10
Section 3 Overall Evaluation.....	13
Subchapter 2 The German Legal System of Labor Dispatch	14
Section 1 Development Status	14
Section 2 The Legal Regulation	5
Section 3 Overall Evaluation.....	17
Subchapter 3 The Japanese Legal System of Labor Dispatch	17
Section 1 Development Status	17
Section 2 The Legal Regulation	18

Section 3 Overall Evaluation·····	20
Subchapter 4 Foreign Legal System of Labor Dispatch to China's	
Enlightenment ·····	20
Section 1 Attaches Great Importance to Considering the Domestic Labor	
Market·····	20
Section 2 Attaches Great Importance to Protecting Laborer's Legitimate Rights	
and Interests in Accordance with Law ·····	21
Section 3 Attaches Great Importance to Limiting Overuse of Labor Dispatch ·	22
Chapter 3 The Current Situation and Existing Problems of Legal	
Regulation of Labor Dispatch in China ·····	23
Subchapter 1 The Current Situation of Labor Dispatch in China ·····	23
Section 1 The Development Course·····	23
Section 2 The Development Scale·····	24
Subchapter 2 Analyzes the Current System of Labor Dispatch in China ·	25
Section 1 The Legislative Principles ·····	25
Section 2 Main Contents of Legal Systems ·····	26
Subchapter 3 Reason and Existing Problems of China's Legal Regulation of	
Labor Dispatch in Implementation ·····	29
Section 1 Existing Problems of China's Legal Regulation of Labor Dispatch in	
Implementation ·····	29
Section 2 Analyzes Reason·····	32
Chapter 4 The Refinements of Legal Systems of Labor Dispatch in	
China ·····	34
Subchapter 1 Establish a Strict Market Access and Exit Mechanism of Labor	
Dispatch ·····	34
Section 1 Market Access Mechanism·····	34
Section 2 Exit Mechanism ·····	36
Subchapter 2 Regulate the Application Scope of Labor Dispatch ·····	36
Section 1 Define the Industries and Positions which Applicable for Labor	
Dispatch·····	36
Section 2 Further Clarify The "Three Natures" of Labor Dispatch·····	37
Section 3 Strictly Control the Proportion of Dispatched Workers among	
Workers ·····	38

Subchapter 3 Rotect the Equal Employment Rights of Laborers for Services	
.....	38
Section 1 The Protection of Laborer's Right of Freely Choosing Jobs	38
Section 2 The Protection of Laborer's Right of Occupational Equality	39
Subchapter 4 Confirm Joint Liability that two “Employers” to “Employee” in Labor Dispatching	41
Section 1 The Precondition to Confirm the Employer’s Liability is Affirming the Legal Employment Relationship between a Dispatched Worker and an Entity that Accepts the Worker	41
Section 2 The Labor Dispatch Service provider and the Accepting Entity Shall be Jointly and Severally Liable to the Dispatched Worker	41
Section 3 The Internal Liability between the Labor Dispatch Service provider and the Accepting Entity	42
Conclusion	43
Bibliography	44
Acknowledgements	47

Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to etd@xmu.edu.cn for delivery details.

厦门大学博硕士论文摘要库